LINA JOY

v.

MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R2-24-30-2000]
18 APRIL 2001

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of religion - Renunciation of Islamic faith - Declaratory orders - Whether plaintiff a Muslim by definition - Whether Administration of Islamic Law (Federal Territories) 1993 ultra vires art. 11(1) Federal Constitution - Whether plaintiff could renounce her religion - Whether Syariah Court only court with jurisdiction to determine issue of conversion out of Islam - Federal Constitution, arts. 11(1), (3), 121(1A), 160 - Administration of Islamic Law (Federal Territories) 1993, ss. 2, 7(1)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Jurisdiction of civil courts and Syariah Court - Renunciation of Islamic faith - Declaratory orders - Whether plaintiff a Muslim by definition - Whether Administration of Islamic Law (Federal Territories) 1993 ultra vires art. 11(1) Federal Constitution - Whether plaintiff could renounce her religion - Whether Syariah Court only court with jurisdiction to determine issue of conversion out of Islam - Federal Constitution, arts. 11(1), (3), 121(1A), 160 - Administration of Islamic Law (Federal Territories) 1993, ss. 2, 7(1)*

ISLAMIC LAW: *Jurisdiction - Syariah Court - Jurisdiction of civil courts and Syariah Court - Renunciation of Islamic faith - Declaratory orders - Whether plaintiff a Muslim by definition - Whether Administration of Islamic Law (Federal Territories) 1993 ultra vires art. 11(1) Federal Constitution - Whether plaintiff could renounce her religion - Whether Syariah Court only court with jurisdiction to determine issue of conversion out of Islam - Federal Constitution, arts. 11(1), (3), 121(1A), 160 - Administration of Islamic Law (Federal Territories) 1993, ss. 2, 7(1)*

WORDS & PHRASES: *"Muslim" - Definition of - Administration of Islamic Law (Federal Territories) 1993, s. 2*

WORDS & PHRASES: *"Malay" - Definition of - Federal Constitution, art. 160*

This was an application by the plaintiff for various declaratory orders, namely: (i) her rights to religious freedom under art. 11(1) of the Federal Constitution ('the Constitution'); (ii) that s. 2 of the Administration of Islamic Law (Federal Territories) 1993 ('the 1993 Act') and other related state enactments were null and void by virtue of being inconsistent with art. 11(1) of the Constitution; (iii) that the 1993 Act, the Syariah Criminal Offences (Federal Territories) Act 1997 and other related state enactments were not applicable to the plaintiff, who had purportedly professed the religion of Christianity; (iv) that any laws, whether state or federal legislations, which forbade or imposed restrictions on conversions out of Islam, were null and void by virtue of being inconsistent with art. 11(1) of the Constitution; and (v) that the defendants enter the plaintiff's name in the Registry Book as having converted out of Islam. The plaintiff, born a Muslim, averred that she had converted into Christianity and that she had been baptised in a church. She applied to the National Registration Department to change her name and to remove the word "Islam" from her new identity card. She had **not** applied to the Syariah Court to convert out of Islam. The defendants contended that since the plaintiff was still a Muslim, the issue of her conversion out of Islam was within the exclusive jurisdiction of the Syariah Court.

Held (dismissing the plaintiff's application):

[1] The plaintiff was born a Muslim, lived as a Muslim with her family and was commonly reputed to be a Muslim. All this was strong evidence of her being a person who professed the religion of Islam. Therefore, the plaintiff, at all material times, was a Muslim within the meaning of s. 2 of the 1993 Act, and her well-being as a Muslim was the duty and care of the 1st defendant in accordance with art. 11(3) of the Constitution and s. 7(1) of the 1993 Act which were enacted in accordance with Islamic law. (p 263 b-c)

[2] The purpose of s. 2 of the 1993 Act is merely to define a Muslim since the Constitution did not provide such a definition. This is important because Syariah law is only applicable to Muslims and without a definite provision, there would be confusion in relation to its application. The 1993 Act could only be *ultra vires* art. 11(1) of the Constitution if there was no section on such a definition as it would impose Syariah law on everyone regardless of religion. Thus, s. 2 of the 1993 Act complements art. 11(1) of the Constitution as it limits the application of Syariah law to only Muslims. (p 266 g-h)

[3] By virtue of cl. 1A of art. 121 of the Constitution, the civil courts have no jurisdiction in respect of matters within the jurisdiction of the Syariah Court. In the instant application, the root of the plaintiff's complaint and the practical effect of the declaratory orders were to enable her to convert

out of Islam, an issue within the exclusive jurisdiction of the Syariah Court. Therefore, by granting the present application, this court would not only create confusion but would also be declaring something that was contrary to art. 121(1A) of the Constitution. (p 268 a, b & f)

[4] By virtue of art. 160 of the Constitution, the plaintiff was by definition a "Malay" and, therefore, could not renounce her Islamic religion at all. This court's decision was based purely on the interpretation of the definition of "Malay" under art. 160 of the Constitution, and did not touch the plaintiff's decision to leave the Islamic faith as this was a matter that was left to the Syariah Court to deal with. (p 272 c-d)

[5] In conclusion, art. 11(1) of the Constitution gives a person the freedom to profess a religion of his choice; however, on the issue of a Muslim converting out of Islam, the only court that is competent to determine such a matter is the Syariah Court. (p 272 g)

Case(s) referred to:

Attorney General of Commonwealth, ex-relation Mc Kinley v. Commonwealth of Australia (975) 135 CCRI ***(refd)***

Che Omar Che Soh v. PP [1988] 2 MLJ 55 ***(refd)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Dato' Menteri Othman Baginda v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Dewan Undangan Negeri Kelantan v. Nordin Salleh [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Hjh Halimatunsaadiah Hj Kamaruddin v. Public Services Commission, Malaysia [1994] 3 MLJ 61 ***(refd)***

Imperial Tabacoo Ltd & Anor v. Attorney General [1980] 1 All ER 866 ***(refd)***

JB Jeyaretnam v. Attorney General [1990] 2 CLJ 477; [1990] 3 CLJ (Rep) 643 HC ***(refd)***

Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***

Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996] 3 CLJ 231 HC ***(refd)***

Loh Kooi Choong v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***

London Passengers Transport Board v. Moscrop [1942] AC 332 ***(refd)***

Majlis Agama Islam Negeri Sembilan v. Hun Mun Meng [1993] 1 CLJ 179 HC ***(refd)***

Majumder v. Attorney General of Sarawak [1967] MLJ 101 ***(refd)***

Mamat Daud v. Government of Malysia [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC ***(refd)***

Md Hakim Lee v. Majlis Agama Islam WP, Kuala Lumpur [1997] 4 CLJ Supp 419 HC ***(refd)***

Meor Atiqulrahman Ishak dan Lain-lain lwn. Fatimah Sihi dan Lain-lain [2000] 1 CLJ 393 HC ***(refd)***

Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264 SC ***(refd)***
Odhams Press Ltd v. London and Pronvincial Sporting News Agency (1929) Ltd [1936] Ch 357 ***(refd)***
Phang Chin Hock v. PP [1980] 1 MLJ 70 ***(refd)***
PP v. Pung Chen Choon [1994] 1 MLJ 566 ***(refd)***
Ramah Ta'at v. Laton Malini Sultan [1927] 6 FMSLR 128 ***(refd)***
Re Mohamed Said Nabi Decd [1965] 31 MLJ 21 ***(refd)***
Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994] 2 CLJ 107 HC ***(refd)***
Sukma Dermawan Susmitaat Manja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 FC ***(refd)***
Tengku Jaffar Tengku Ahmad v. Karpal Singh [1993] 3 MLJ 156 ***(refd)***
Teoh Eng Huat v. Kadhi, Pasir Mas & Anor [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277 SC ***(refd)***

Legislation referred to:
Administration of Islamic Law (Federal Territories) 1993, ss. 2, 7(1), 46(2)(b)(x), 85
Courts of Judicature Act 1964, s. 23
Evidence Act 1950, s. 45
Federal Constitution, arts. 3(1), (4), 11(1), (3)(a), (4), (5), 12(2), 74, 77, 121(1A), (A), 160(2), Sch. 9 list II
Government Proceedings Act 1956, s. 22
Islamic Family Law (Federal Territories) Act 1984, s. 5
Penal Code, s. 298A
Rules of the High Court 1980, O. 18 r. 19
Specific Relief Act 1950, s. 42

Constitution of India [Ind], art. 25

Other source(s) refered to:
Federation of Malaya Constitutional Proposal 1957, para 57
Freedom of Religion Under Federal Constitution of Malaysia – A Reappraisal, [1994] 2 CLJ lvii
MP Jain, *Indian Constitutional Law,* p 853
Mohammad Hasim Kamali, *Islamic Law in Malaysia, Issues and Development,* p 34
Sheridan, *The Religion of the Federation,* [1988] 2 MLJ xiii
Tun Mohamed Suffian, *An Introduction to the Constitution of Malaysia,* 2nd edn, p 45
Tun Mohamed Suffian, *An Introduction to the Legal System of Malaysia,* 2nd, p 10
Tun Mohamed Suffian, HP Lee, FA Trindade, *Constitution of Malaysia: Its Development: 1957-1977,* p 51
Tun Salleh Abas, *Constitution, Law and Judiciary,* pp 45-46

For the plaintiff - Benjamin Dawson (Yapp Hock Swee); M/s Nik Hussain & Partners
For the 1st respondent - Hj Sulaiman Abdull (Halimahtunsa'adiah); M/s Zain & Co
For the 2nd respondent - Azahar Mohamed

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:

By an originating Summons dated 15 May 2000 (encl. 1), the plaintiff is applying for various declaratory orders, namely:

(i) Her rights to religious freedom under art. 11(1) of the Federal Constitution (Prayer 1, 2 and 3);

(ii) That s. 2 Akta Pentadbiran Undang-Undang Islam (Wilayah Persekutuan) 1993 (hereinafter referred to as the 1993 Act) and other related State Enactments are null and void being inconsistent with art. 11(1) of the Federal Constitution (prayer 4);

(iii) That the 1993 Act, Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1997 and other related State Enactments are not applicable to the Plaintiff, who has (purportedly) professed the religion of Christianity (prayer 5);

(iv) That any laws, whether State or Federal legislations, which forbid or impose restrictions on conversion out of Islam, are null and void, being inconsistent with art. 11(1) of the Federal Constitution (Prayer 6-8);

(v) That the defendants enter the plaintiff's name in the Registry Book as having converted out of Islam (prayer 9).

In her supporting affidavit affirmed on 2 June 2000, the plaintiff disclosed in para. 6 that she was born a Muslim and both her parents were Muslims. In para. 6(c) she averred that she has now purportedly converted into Christianity and was baptized in a church. (See exh. "A"). However it is to be noted that she had not applied to the Syariah Court to convert out of Islam.

Briefly the undisputed facts are as follows: The plaintiff was born as a Muslim bearing the name Azlina bte Jailani. The plaintiff was born to Muslim parents. The plaintiff's natural father, Jailani bin Shariff is a Malay. The plaintiff's father, without break, in his lifetime practised the religion of Islam. The plaintiff's natural mother, Kalthum binti Omar is a Malay. The plaintiff's mother, without break, in her lifetime practised the religion of Islam. The plaintiff was brought up in an Islamic family and environment. In 1990 the plaintiff was 26 years old. The plaintiff is commonly reputed to be a Muslim (paras. 10, 12, 13 and 14 of the plaintiff's affidavit affirmed on 8 May 2000 has reference). On 21 February 1997 the plaintiff applied to the National Registration Department (NRD) to change her name from Azlina bte Jailani to Lina Lelani. The plaintiff stated in her Surat Akuan (exh. 'C' of the plaintiff's affidavit) to support the above application that, *inter alia*, the plaintiff intends

to marry a person who is Christian. The said application was rejected on 15 March 1999. The plaintiff applied again to NRD to change her name from Azlina binti Jailani to Lina Joy. The plaintiff made another application to NRD to remove the word "Islam" from the plaintiff's new identity card.

By a summons in chambers dated 21 July 2000 (encl. 4), the 2nd defendant is applying to strike out the plaintiff's application under O. 18 r. 19, Rules of the High Court 1980 (RHC) and/or under the inherent jurisdiction of the court on two grounds, namely:

(i) That it discloses no reasonable cause of action.

(ii) It is otherwise an abuse of the process of the court.

The grounds of the application as affirmed by Dato' Azahar bin Mohamed on 20 July 2000 is that since the plaintiff is still a Muslim, the issue of her conversion out of Islam is within the exclusive jurisdiction of the Syariah Court. By a summons in chamber dated 28 September 2000 (encl. 10), the 1st defendant is applying to strike out the plaintiff's application under O. 18 r. 19 RHC 1980 and/or under the inherent jurisdiction of the court on the following grounds:

(i) it discloses no reasonable cause of action;

(ii) it is scandalous, frivolous or vexatious;

(iii) it is otherwise an abuse of the process of the court.

The ground of the application is that this High Court has no jurisdiction to hear this action because the jurisdiction lies in the Syariah Courts as the plaintiff is still a Muslim.

In prayer 1, 2 and 3 of the plaintiff's application, her contention is that she has a freedom to profess a religion of her choice under art. 11(1) of the Federal Constitution, which supersedes any other Federal or State laws and that her freedom to profess is a matter of personal choice and not to be dictated by any party. It is observed that the plaintiff is so obsessed with the first part of art. 11(1) of the Federal Constitution and had given it an interpretation to the effect that the said first part of art. 11(1) gives her the right to profess and practise the religion of her choice. I think art. 11 of the Federal Constitution actually speaks of freedom of religion and not freedom of choice which are distinct. Looking at the wording of the first part of art. 11(1) it is clear that "every person has the right to profess and practise his religion". This means, that there is no restriction on the right of any person to profess and practise

his religion which is guaranteed by art. 11 of the Constitution. Hence if a Muslim wishes to renounce/leave his original religion for another, therefore the application of the first part of art. 11(1) is subject to the second part of art. 11(1) and also to art. 11(4) and art. 11(5) of the Federal Constitution because the issue of change of a person's religion is directly connected to the rights and obligations of that person as a Muslim. Clauses (1), (4) and (5) of art. 11 of the Federal Constitution provide as follows:

> Article 11
>
> (1) Every person has the right to profess and practise his religion and, subject to cl. (4), to propagate it.
>
> (4) State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, Federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
>
> (5) This article does not authorise any act contrary to any general law relating to public order, public health or morality.

Professor Ahmad Ibrahim in his article entitled "*The Position of Islam in the Constitution of Malaysia"* in the book entitled the *Constitution of Malaysia: Its Development: 1957 – 1977* edited by Tun Mohamed Suffian, H.P. Lee, F.A. Trindade, at p. 51 said:

> Article 11 of the Federal Constitution provides that every person has the right to profess and practise his religion and subject to Clause (4) to propagate it. Clause (4) provides that State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion. No person shall be compelled to pay any tax, the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own. Every religious group has the right to manage its own affairs, to establish and maintain institutions for religious or charitable purposes and to acquire and own property and hold and administer it in accordance with law.

The case of *Hjh Halimatunsaadiah bte Hj. Kamaruddin v. Public Services Commission, Malaysia* [1994] 3 MLJ 61 involved a discussion of both cls. (1) and (5) of art. 11 of the Constitution:

> It is trite that Article 11(1) of the Constitution guarantees the freedom of religion, where every person has the right to profess and practise his religion. However, such right is not absolute as Article 11(5) provides that this article does not authorise any act contrary to any general law relating to public order, public health or morality.

It is clear that cls. (4) and (5) above preserve and protect the harmony and preserve the affairs and interests of Muslims and non-Muslims in this country whereby the rights of the various races and religions are also protected. When a Muslim wishes to renounce/leave the religion of Islam, his other rights and obligations as a Muslim will also be jeopardised and this is an affair of Muslim falling under the First Defendant's jurisdiction as provided by art. 11(3)(a) of the Federal Constitution read with s. 7(1) of the Act. Article 11(3)(a) clearly states that every religious group has the right to manage its own religious affairs whereas the Act was created to provide for the Federal Territories a law concerning the enforcement and administration of Islamic Law, the constitution and organisation of the Syariah Court, and related matters as stated in the preamble of the Act. Even though the first part 1 art. 11(1) of the Federal Constitution provides that every person has the right to profess and practise his religion, this does not mean that the plaintiff can hide behind this provision without first settling the issue of renunciation of her religion (Islam) with the religious authority which has the right to manage its own religious affairs under art. 11(3)(a) of the Federal Constitution. If the plaintiff is allowed to do so, this will create chaos and confusion with the administrative authority which manages the affairs of Islam and the Muslim community and consequently the non-Muslim community as a whole. I am of the opinion that this would threaten public order and this cannot have been the intention of the Legislature when drafting the Federal Constitution and the Act.

In the instant case, the applicant prays for a specific declaration, that she has the absolute religious freedom under art. 11(1) to profess the religion of her choice and that such constitutional right supersedes any Federal or State laws. The terms 'profess' is not defined by the Constitution. In *Re Mohamed Said Nabi Decd* [1965] 31 MLJ 21, Chua J adopted the term "profess" from the Shorter English Dictionary to mean "… to affirm, or declare one's faith or allegiance to (a religion, principle, God or Saint, etc.)." In the context of the instant case, since the plaintiff is still a Muslim and she wanted to convert out of Islam, the issue then is whether her rights to affirm or declare her faith in Christianity is subject to the relevant syariah laws on apostasy, declared by *Soon Singh*'s case, (see [1994] 1 MLJ 690) to be within the jurisdiction of the Syariah Courts. In short, whether the plaintiff's rights to convert out of Islam under art. 11(1) is subject to the syariah laws. In order to appreciate this issue, it would be appropriate to recall what Barwick CJ said on

constitutional interpretation in *Attorney General of Commonwealth, ex-relation Mc Kinley v. Commonwealth of Australia* (975) 135 CCRI as adopted by Abdul Hamid Omar, LP in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72:

> … The only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

I am of the view by looking at the constitution as a whole, it is the general tenor of the constitution that Islam is given a special position and status, with art. 3 declaring Islam to be the religion of the Federation. Tun Mohamed Suffian in his book *"An Introduction to the Legal System of Malaysia"* 2nd edn at p. 10, said that this provision constitute one of the basic features of the Malayan Constitution. Article 3(1) reads:

> Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation.

In *Teoh Eng Huat v. Kadhi, Pasir Mas & Anor* [1990] 2 CLJ 11; [1990] 1 CLJ (Rep) 277, Abdul Hamid LP adopted the opinion of Lord Denning on constitutional interpretation "… to ascertain for ourselves what purpose the founding fathers of our constitution had in mind when our constitutional laws were drafted …". The starting point would be the Reid Commission which makes a finding after negotiations, discussions and consensus between the British Government, the Malay Rulers and the Alliance party representing various racial and religious groups. Paragraph 169 of the Reid Report is on religion, where the report is based on the unanimous recommendation of the Alliance party stated:

> The religion of Malaysia shall be Islam. The observance of this principles shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the state is not a secular state. (See *Teoh Eng Huat* at page 301-302.)

From the Reid Report is the *Federation of Malaya Constitutional Proposal 1957 (The White Paper)*. The recommendation on religion in the White Paper is in para. 57 which states:

> There has been included in the proposed Federation Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a Secular state, and every person will have the right to profess and practice his own religion, though this last right is subject to any restriction imposed by state law relating to the propagation of any religious doctrine or belief among persons professing the religion of Islam. (See Tan, Yew and Lee's *Constitutional Law in Malaysia and Singapore* – 2nd Edition at page 994).

It is pertinent to note that Tun Mohamed Suffian bin Hashim in his book *"An Introduction to the Constitution of Malaysia* (2nd edn) at p. 45 said:

> Islam had long been established in the country before the conquest of Malacca by the Portuguese in 1511. It was left undisturbed by the British in the century or so they controlled the country. It is not therefore surprising when the constitution by Article 3(1) provides that Islam is the religion of the Federation. As has already been seen, the constitution at the same time guarantees the freedom of everybody to practice in peace and harmony his own religion.

Therefore from the inception of the Constitution the religion of Islam has been given the special status of being the main and dominant religion of the Federation. Dr. Mohammad Imam in his article *"Freedom of Religion Under Federal Constitution of Malaysia – A Reappraisal"* [1994] 2 CLJ lvii has adopted the purposive interpretation to art. 3(1) to the extent that art. 3(1) "… cast upon the 'Federation' a positive obligation to protect, defend and promote the religion of Islam …".

In *Meor Atiqulrahman bin Ishak dan Lain-lain lwn. Fatimah bt. Sihi dan Lain-lain* [2000] 1 CLJ 393, Mohd. Noor Abdullah J gave several meanings to the term Islam in art. 3, namely:

(i) Islam is the religion of Malaysia, comprising of Malays who are Muslim, Chinese, Indian and Others practising Buddhism, Hinduism, Christianity and Others.

(ii) Malaysia is a secular state.

(iii) The country could implement Syariah laws that was not inconsistent with the constitution on Muslims.

(iv) That the country could not impose Syariah laws on non-Muslims.

In the instant case the plaintiff has made a fundamental error in constitutional interpretation when she asserts that art. 3(4) reaffirms the primacy and precedence of art. 11(1). There is nothing in the Federal Constitution to even suggest that art. 11(1) takes precedence over art. 3(1). The term "derogates" in art. 3(4) simply means that art. 3 "does not reduce" other provisions in the constitution (See *Legal Thesaurus* by Williams C. Burton). Article 3(4) does not have the effect of reinforcing the status of the Federation as a secular state as suggested by the plaintiff. In *"Freedom of Religion in Malaysia"* by Lee Choon Min, the writer is of the opinion that Malaysia is not purely a secular state like India or Singapore but is a hybrid between the secular state and the theocratic state. The constitution of this hybrid model accords official or preferential status to Islam but does not create a theocratic state like Saudi Arabia or Iran. Contrary to the plaintiff's assertion, the subject and purpose of art. 3(1) is not merely "to fix" the official religion of a nation. The case of *Che Omar bin Che Soh v. Public Prosecutor* [1988] 2 MLJ 55 did not decide on art. 3(1), that is, the meaning of Islam as the Religion of the Federation. (See Sheridan – *The Religion of the Federation* [1988] 2 MLJ xiii. Article 3(1) has a far wider and meaningful purpose than a mere fixation of the official religion. One of the natural consequences from the fact that Islam is the religion of the Federation is the limitation imposed on the propagation among persons professing the religion of Islam in art. 11(4). Other consequences which emanate from the pronouncement of Islam in art. 3(1) is the establishment of Islamic institution for the furtherance of the religion of Islam with funds to be expended for the advancement of the Islamic religion. (See Tun Salleh Abas on *Constitution, Law and Judiciary* at pp. 45-46 and Mohammad Hasim Kamali – *Islamic Law in Malaysia, Issues and Development* at p. 34). The plaintiff's interpretation of art. 11(1) is by reading it in a limited and isolated manner, without due regard to the other provisions in the Federal Constitution. This restrictive interpretation advocated by the plaintiff would result in absurdities not intended by the framers of the Constitution, namely, how would one reconcile the restrictive interpretation of art. 11(1) with the relevant provisions on the Islamic religion in the Constitution itself, such as art. 3(1), 12(2), 74 and 121(1A). "The Constitution is a living piece of legislation and that should be interpreted with less rigidity and more generosity than other acts" (see Raja Azlan Shah FCJ (as DYMM then was) *Dato' Menteri Othman bin Baginda v. Dato' Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98). To avoid such absurdities resulting from a restrictive approach would be to apply the principle of harmonious construction. M.P. Jain in "*Indian Constitutional Law"* explains the purpose of harmonious construction at p. 853:

> The Constitution should be so interpreted as to give effect to all its parts. The presumption is that no conflict or repugnancy was intended by the framers between the various provisions of the Constitution. Accordingly, it had been laid down that if certain provisions in the Constitution appear to be in conflict with each other, these provisions should be interpreted so as to give effect to a reconciliation between them so that, if possible, effect could be given to all. This is, what is known as, the rule of harmonious construction. … The principle of harmonious construction has been applied to interpret the entries in the various legislative list. The fundamental rights and the legislative privileges have also been reconciled … The principle of harmonious construction has been applied to the fundamental rights and directive principles so as to give effect to both as far as possible.

Applying the principle of harmonious construction is to read art. 11(1) together with art. 3(1), 12(2), 74, 121(1A) and 160 so as to give effect to the intention of the framers of our constitution. When read together art. 11(1) must necessarily be qualified by provisions on Islamic law on apostasy enacted pursuant to art. 74 list II in respect of the plaintiff's intention to convert out of the Islamic religion. Her purported renunciation of Islam can only be determined by the Syariah Courts and not the Civil Courts pursuant to art. 121(1A).

There is also a clear nexus between art. 3(1) and 11(1) as both articles dealt with the issue of religion. Article 11(4) is the consequence of the declaration that Islam is the religion of the Federation. The declaration in art. 3(1) has the consequence of qualifying a muslim's absolute right to murtad in art. 11(1) by requiring that compliance to the relevant syariah laws on apostasy is a condition precedent. Another fundamental error in the plaintiff's case is her assertion that the principle of freedom of conscience is housed in art. 11(1). Here, the plaintiff sought to equate art. 11(1) to art. 25 of the Indian Constitution, which reads:

> 25. Freedom of conscience and free profession, practice and propagation.
>
> (1) Subject to public order morality and health and to the other provisions of this Part all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

The most obvious distinction between art. 11(1) and art. 25 of the Indian Constitution is the conspicuous absence of the words "freedom of conscience" and "free profession …" In art. 11(1). "The freedom of conscience is the absolute inner freedom of the citizen to mould his own relation with God in whatever manner he pleases …." The plaintiff's conclusion that her right to murtad is not circumscribed in any manner except in her own choice would be correct if read in the context of freedom of conscience in art. 25 of the

Indian Constitution. But in the absence of such "freedom of conscience" in art. 11(1), the plaintiff cannot assert that art. 11(1) gives her the absolute and unqualified right to convert out of the Islamic religion. The same is to be determined by the Syariah Courts. The plaintiff's extensive reference to the Indian Constitution in her submission is clearly misplaced. The Forty Second Amendment of 1976 has declared India to be a secular state. There is no such pronouncement in the Federal Constitution. There is also no equivalent provision to art. 3(1), 12, 121(1A) and 160 in the Indian Constitution. Raja Azlan Shah FCJ (as DYMM then was) in *Loh Kooi Choong v. Government of Malaysia* [1977] 2 MLJ 187 at pp. 188-189 said:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands on its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' – see *Adegbenro v. Akintola & Anor*. Each country frames its constitution according to its genius and for the good of its own society.

Therefore the position of Islam in art. 3(1) is that Islam is the main and dominant religion in the Federation. Being the main and dominant religion, the Federation has a duty to protect, defend and promote the religion of Islam. This proposition is reinforced by the Fourth Schedule where it states that in his oath of office, The Yang Di Pertuan Agong among other things solemnly and truly declares that he shall at all time protect the religion of Islam and to hold the rule of law and order of the country. As such the country could impose syariah laws on Muslim which are not inconsistent with the Constitution. Thus, in the context of the instant case, since the applicant is still a Muslim, the finality of her decision to convert out of Islam is within the competency of a Syariah Court. (See *Md. Hakim Lee v. Majlis Agama Islam WP, Kuala Lumpur* [1997] 4 CLJ Supp 419 HC.

Article 3(1) of the Federal Constitution declares that "Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation". The very fact that people professing religion other than Islam are constitutionally guaranteed the right to practise their faith in peace and harmony, must necessarily mean that Muslims are also similarly guaranteed the right to practise Islam in a like manner. Being the religion of the Federation, Islam has a special position in Malaysia. The Ruler of a State of the Federation is the head of the religion of Islam in his State and the Yang Di Pertuan Agong is head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan in addition of being so in his own state and in the States of Malacca, Penang, Sabah and Sarawak (see *Mohamed Habibullah bin Mahmood v. Faridah bt. Dato' Talib* [1993] 1 CLJ 264). Article 74(2) of the Federal Constitution provides as follows:

> Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

Article 74(2) read with the Second List of the Ninth Schedule, confers the power to make law on the State legislatures, and on Parliament in respect of the Federal Territories of Kuala Lumpur and Labuan on the subject of "Islamic Law and personal and family law of persons professing the religion of Islam …". This includes, *inter alia*, the Islamic Law relating to betrothal, marriage, divorce, dowry and maintenance, the constitution, organisation and procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam. In *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419 Abdul Kadir Sulaiman J (as he then was) referred to art. 74 of the Constitution:

> This matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art. 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah Court on its wider jurisdiction over a person professing the religion of Islam even if no express provisions are provided in the Administration of Islamic Law (Federal Territories) Act 1993 ("the Act") because under art. 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court.

In *Md. Hakim Lee*, Abdul Kadir Sulaiman J (as he then was) had made a ruling that the jurisdiction given by para 1 of the List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the Syariah Court and thereby disagreed with *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pianng & Anor* [1996] 3 CLJ 231 which had construed para 1 of II – Ninth Schedule narrowly. At p. 429 in *Md. Hakim Lee* Abdul Kadir Sulaiman J (as he then was) said:

> As for the decisions so far given by the courts of coordinate jurisdiction on the interpretation of art. 121(1A) of the Federal Constitution as cited in the arguments, with respect, I would agree with the decision given in *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 2 CLJ 107 that the civil court had no jurisdiction to make a declaration of the nature sought by the plaintiff in this application. So is the decision given in *Hajjah Mahani bt. Sulaiman & Ors. v. Majlis Agama Islam & Adat Melayu Terengganu* [1996] 3 AMR 2898.

Apart from art. 3, other provisions in the constitution enforces the special position of Islam as the main and dominant religion of the Federation. The propagation of any religious doctrine or belief among persons professing the religion of Islam may be controlled or restricted by law (art. 11(4)). The purpose of this restriction is to provide the States with the power to pass a law to protect the religion of Islam from being exposed to the influences of the tenets, precepts and practices of other religions or even of certain schools of thoughts and opinion within the Islamic religion itself (see *Mamat b. Daud v. Government of Malaysia* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197). The Federal Constitution further provides that it shall be lawful for the Federation or State to establish or maintain or assist in establishing or maintaining Islamic institutions or providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purposes (art. 12(2)). Article 74 (2) grants the Federal/State powers to legislate on syariah matters as specified in para. 12, list I, 9th Schedule, Federal Constitution. The religion of Islam is also given royal patronage with the Rulers in the State as the Head of the religion of Islam and the Yang Di Pertuan Agong is the head of the religion of Islam in Sabah, Sarawak, Penang and Malacca and the Federal Territories. One of the most significant development pertaining to the position and status of Islam is the introduction of art. 121(1A) which came into force on 10 August 1988. Article 121 specially demarcates the jurisdiction between the Syariah and the Civil Courts, to the extent that Civil Court has no jurisdiction over syariah matters. In this regard Harun Hashim SCJ in *Mohamed Habibullah bin Faridah bt Dato Talib* [1993] 1 CLJ 264 at p. 271 said:

> Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident from the Ninth Schedule to the Constitution … Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the syariah courts but also by the civil courts. What Art. 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words Art. 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah Courts.

In order to ascertain the extent of religious freedom to profess under art. 11(1) is to adopt the rule of harmonious construction which requires the court to give effect to the relevant articles conjunctively and disjunctively. (See *Phang Chin Hock v. PP* [1980] 1 MLJ 70. In the case of *Sukma Dermawan Susmitaat Manja v. Ketua Pengarah Penjara Malaysia & Anor*. [1999] 2 CLJ 707, the Federal Court held that cl. (1A) of Act 121 should not be read in isolation or given literal interpretation "… Because literal interpretation would give rise to

consequences which the legislatures could not possibly have intended ...". The court then proceeded to construe both cls. (A) and (1A) of art. 121 together "… And choose a construction which will be consistent with the smooth workings of the system which the article purports to regulate and reject interpretation that will lead to uncertainty and confusion into the workings of the systems …" It is therefore important that art. 11(1) should not be read in isolation. Article 11(1) must be construed harmoniously with the other relevant provisions on Islam, namely art. 3(1), 74(2), 121(1A), 12(2) and 160 (where a Malay is defined as a person who professes the religion of Islam). When construed harmoniously, the inevitable conclusion is that the freedom to convert out of Islam in respect of a Muslim is subject to qualifications, namely the syariah laws on those matters. Only such construction would support the "smooth workings of the system", namely the implementation of the syariah law on the Muslims as provided by the constitution. To grant Muslims the rights to convert out of Islam without final determination by the syariah courts would "… lead to uncertainty and confusion ..." and would contradict the enabling syariah laws on apostasy "… since the question of whether a person was a Muslim or had renounced the faith of Islam transgressed into the realism of the syariah law which needs serious consideration and proper interpretation of such law ..." (per Mohamed Yusoff J in *Dalip Kaur v. Pegawai Polis daerah, Balai Polis Daerah, Bukit Mertajam & Anor*. [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC.

I am of the opinion that the issue of apostasy is an issue coming under the category of religious affairs as provided under art. 11(3)(a) of the Federal Constitution and also comes under "related matters" as provided by the Act and therefore it is an issue not only under the Federal Constitution but also under the Act and therefore it ought to be determined by eminent jurists who are properly qualified in the field of Islamic jurisprudence and definitely not by the civil court. The question as to who is properly qualified in the field of Islamic jurisprudence has been addressed in the case of *Dalip Kaur v. Pegawai Polis Daerah Balai Polis Daerah, Bukit Mertajam & Anor*. [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 which held that the only forum qualified to do so is the Syariah Court. To determine whether the Syariah Court has jurisdiction to hear this issue one need only to refer to s. 46(2)(b) of the Act. I think such jurisdiction is provided under s. 46(2)(b)(x) read with art. 11(3)(a) and Ninth Schedule List 11 – State List of the Federal Constitution and the Preamble title and s. 7(1) of the Act.

Section 46(2) A Syariah High Court shall:

(a) …

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:

(x) other matters in respect of which jurisdiction is conferred by any written law.

Preamble

An Act to provide for the Federal Territories a law concerning the enforcement and administration of Islamic Law, the constitution and organisation of the Syariah Courts, and related matters.

In actual fact art. 11(1) read with cls. (3), (4) and (5) of the Constitution is created for the harmony and well-being of the multi-racial and multi-religious communities of this country. Further more there is a specific statute which provides for the law concerning the enforcement and administration of Islamic law, the constitution and organisation of the Syariah Court and related matters in respect of the Muslim community. When a person wishes to renounce/leave his original religion, he/she has first to resolve the issue of renunciation of religion with the body/authority which protects and preserves the well-being of people professing that religion based on the laws or provisions relating to that religion. This is in accordance with art. 11(3) of the Federal Constitution. Therefore in the instant case, based on the facts stated herein, it is clear that the plaintiff as a Muslim at all material times who purportedly wished to leave/ renounce the religion of Islam must resolve the issue of renunciation of Islam with the authorities which protect and preserve the affairs and interests of Muslims first and foremost before raising the issue of constitution with this court. It must be noted importantly in the instant case that there are numerous matters related to the status of the plaintiff as a Muslim which must be resolved first and these matters can only be considered by eminent jurists who are properly qualified in the field of Islamic jurisprudence that is the Syariah Court. The power of the Syariah Court under s. 46(2)(b)(x) of the Act is linked to art. 11(3) and Ninth Schedule List 11 – State List of the Constitution. I think the plaintiff cannot seek relief from the Civil Court especially when she has yet to exhaust her remedy(s) under the jurisdiction of the Syariah Court. It is difficult to imagine how the administration of justice can be served if the plaintiff is allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter. I think that in actual fact there is no conflict or inconsistency between the first part of art. 11(1) of the Federal Constitution and the provisions in the Act particularly s. 2 of the Act as alleged by the plaintiff. The first part of the art. 11(1) is actually a general

provision and to protect the affairs and preserve the interests of each religion and its followers as is provided under art. 11(3) of the Federal Constitution. In the case of the Islamic religion for the purpose of art. 11(3)(a), the Act was created to smoothen the administration of Islam amongst the Muslim community so that the harmony and well-being of the Muslim community in particular (including the plaintiff) and the Malaysian community in general will be protected and preserved. The abovestated provisions in the Act are not unconstitutional and are not violative of the fundamental right of freedom of religion under art. 11 of the Federal Constitution. The restrictions imposed by the provisions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference with that fundamental right. The provisions strike the correct balance between individual fundamental rights and the interest of public order. As I stated earlier that in interpreting an enactment the court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to redress. The principle of interpretation of statutes demands that a general provision cannot override a specific one, and as such the High Court cannot invoke its general civil jurisdiction under s. 23 of the Courts of Judicature Act 1964 to revive any specific jurisdiction under the said Act (CJA 1964) which has been excluded by the Constitution by virtue of Act 121 (1A) (see *Mohammed Habibullah bin Mahmood v. Faridah bt. Dato Talib*).

The fundamental teaching of Islam pertaining to the freedom of religion is expressed clearly in the Holy Quran. We read in the Holy Quran to the effect: "Let there be no compulsion in religion" (Surah Al-Baqarah 2:256). This is endorsed in a number of other places in the Quran.

Surah Al-Kafirun: 109: 1-6

1. Say: O ye that reject Faith!
2. I worship not that which ye worship,
3. Nor will ye worship that which I worship.
4. And I will not worship that which ye have been wont to worship,
5. Nor will ye worship that which I worship.
6. To you be your Way, and to me mine.

a **Surah Al 'Ankabut: 29:46**

46. And dispute ye not with the People of the Book, except with means better (than mere disputation), unless it be with those of them who inflict wrong (and injury): but say, "We believe in the Revelation which has come down to us and in that which came down to you; our God and your God is One; and it is to Him we bow (in Islam)."

b **Surah Al Baqarah: 2:62**

62. Those who believe (in the Qu'ran) and those who follow the Jewish (scriptures), and the Christian and the Sabians, – any who believe in God and the Last Day, and work righteousness, shall have their reward with their Lord, on them shall be no fear, nor shall they grieve.

c **Surah Al Nisa': 4:137**

137. Those who believe, then reject faith, then believe (again) and (again) reject faith, and go on increasing in unbelief, – God will not forgive them nor guide them on the way.

d **Surah Al Kahf: 18: 29**

29. Say, "The Truth is from your Lord": Let him who will believe, and let him who will, reject (it): for the wrong-doers We have prepared a Fire whose (smoke and flames), like the walls and roof of a tent, will hem them in; if they implore relief they will be granted water like melted brass, that will scald their faces, how dreadful the drink! How uncomfortable a couch to recline on!

e **Surah Yunus: 10:99**

99. If it had been thy Lord's Will, they would all have believed, – all who are on earth! wilt thou then compel mankind against their will, to believe!

f **Surah Al Tawbah: 9:6**

6. If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the Word of God, and then escort him to where he can be secure. That is because they are men without knowledge.

g

h

i

The Holy Quran therefore declares the freedom of the individual to profess the religion of his or her choice without compulsion. According to Islam if a man whose religion is Islam makes a declaration by deed poll that he renounces the religion of Islam he removes himself from the religion of Islam and is a murtad. However, in order to decide whether he is a murtad or not he must be found by a Syariah Court and there must be a decision of the Syariah Court that he is a murtad, if it is not found or decided by Syariah Court that he is a murtad then the person remains a Muslim (See *Dalip Kaur*). The religion of Islam depends on faith. Islam itself means submission to the will of Allah; and the willing submission of oneself to the will of Allah must be attained through conviction and reasons. And so when a plaintiff who is a Muslim wishes to repudiate his submission to the will of Allah it is only imperative that the determination of such a serious issue is carried out by Syariah Court judges who are properly qualified in the field of Islamic jurisprudence. In this connection we must not overlook that article 11(1) also applies to Muslim in that they are not to be compelled or be put under undue influence so as to become apostates. Conversion out of Islam is not just a personal or private matter: it is capable of serious consequences such as on matters relating to marriage and inheritance. Mohamed Yusof SCJ in Dalip Kaur added:

> Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple, he was definitely an apostate. The present question, in my view cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurist who are properly qualified in the field of Islamic jurisprudence. On this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurist to do so. The only forum qualified to do so is the syariah courts.

The above statement found support in the Supreme Court decision of *Mohamed Habibullah bin Mahmood v. Faridah bt Dato' Talib (supra)* where Mohamed Azmi SCJ is of the opinion that the issue of renunciation of Islam is under the jurisdiction of the syariah court for determination under s. 5 of the Islamic Family Law (Federal Territory) Act 1984. Gunn Chit Tuan SCJ (as he then was) also adopted the above statement of Mohamed Yusof SCJ and stated that "… In determining whether a Muslim has renounced Islam, the only forum qualified to answer that question is the Syariah Court ..." (see p. 822).

In *Soon Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*. [1994] 2 CLJ 107, the High Court held that it is clear from the fatwa that a Muslim who renounced the Islamic faith by a deed poll or who went through a baptism ceremony to reconvert to Sikhism continued to remain in Islam until a declaration has been made in a Syariah Court that he is a 'murtad'. Therefore, in accordance with the fatwa, the plaintiff is still a Muslim. He should go to the Syariah Court for the declaration. Whether or not his conversion is invalid is also a matter for the Syariah Court to determine in accordance with hukum syarak and the civil courts have no jurisdiction. Mohamed Dzaiddin FCJ (as he then was) delivering the Federal Court judgment in Soon Singh said:

> … it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction implied in and falling within the jurisdiction of the Syariah Courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with hukum syarak (*Dalip Kaur*). As in the case of conversion to Islam, certain requirements must be complied with under hukum syarak for a conversion out of Islam to be valid, which only the syariah courts are the experts and and appropriate to adjudicate. In short, it seem inevitable that since matters on conversion to Islam come under the jurisdiction of the syariah courts, by implication, conversion out of Islam should also fall under the jurisdiction of the syariah courts.

Therefore, it can be concluded that the validity of a person's renunciation of Islam can only be determined by the Syariah Courts based on hukum syarak. To conclude, art. 11(1) gives a person the freedom to profess a religion of his choice, but on the issue of conversion out of Islam, a Muslim is bound by the syariah law on the matter.

Section 2 of the 1993 Act provides a Muslim to mean:

(a) person who profess the religion of Islam;

(b) a person either or both of whose parents were, at the time of the persons birth, Muslim;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who has converted to Islam in accordance with the requirements of section 85;

(e) a person who is commonly reputed to be a Muslim; or

(f) a person who is shown to have stated, in circumstance in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.

The plaintiff was born a Muslim, she was brought up as a Muslim or her upbringing was conducted on the basis that she was a Muslim, she lived as a Muslim with her family and is commonly reputed to be a Muslim. All this is strong evidence of her being a person who professes the religion of Islam. Therefore the plaintiff is a Muslim at all material times, within the meaning of "Muslim" in the Act. Hence, her well-being as a Muslim is the duty and care of the 1st defendant in accordance with art. 11(3) of the Constitution and s. 7(1) of the Act which were enacted in accordance with Islamic Law.

Article 11(3)(a) of the Federal Constitution provides:

> Every religious group has the right:
>
> (a) to manage its own religious affairs

Section 7(1) of the Act states:

> It shall be the duty of the Majlis to promote, stimulate, facilitate and undertake the economic and social development and well-being of the Muslim community in the Federal Territories consistent with Islamic law.

The meaning of the word "profess" was at issue in the Singapore case of *Mohamed Said Nabi, Decd* [1965] 31 MLJ 121 whereby Chua J referred to the Shorter Oxford English Dictionary which defines "profess" as follows:

> to affirm, or declare one's faith in allegiance to (a religion, principle, God or Saint, etc.)

The meaning of Islamic law is clearly stated in s. 2 of the Act as "Islamic Law according to any recognized Mazhab". The issue regarding the application of Islamic Law to the Muslim community has long been considered as in *Ramah bte Ta'at v. Laton bte Malini Sultan* [1927] 6 FMSLR 128, whereby Thorne J held that Islamic law is not a foreign law but a local law and addressed his opinion to the then colonial government in these words:

> It is perhaps not out of place for me to remark that the time has now arrived when the attention of the executive might well be drawn to the existing state of the law as affecting Mohamedans in the Federated Malay States. Mohamedan Law is varied in the different States in the Federation, and in some instances in different districts of the same State, by local customs having the force of law, and it would not be practicable therefore to pass a Federal Enactment dealing with all the States of the Federation.

> It seems to me, however, that State Enactments might well be passed dealing with the questions of the rights of parties upon divorce, and upon succession to the estate of deceased interstates, which more commonly arise, and giving power to the courts to take evidence in more involved cases not covered by the provisions of the enactment as to the law of the matter in debate. Although I have held that the Supreme Court has jurisdiction to deal with such cases as the present, the further question emerges as to whether or not the Supreme Court is the proper tribunal for dealing with these cases, and whether it would not be more consonant with the views of those professing the Mohamedan religion that His Highness the Sultan in Council in each State should establish special courts for dealing with these cases with an appeal to His Highness the Sultan in Council in each case; of course the jurisdiction of the Supreme Court and of the Court of Appeal would properly be excluded by such enactment.

It is observed that the exclusion of the jurisdiction of the Civil Courts in Islamic Law as envisaged by the Supreme Court in 1927, is now a reality with the coming into force of cl. (1A) of art. 121 of the Federal Constitution with effect from 10 June 1988.

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

It is to be noted that this court is one of the courts referred to in cl. (1). In *Dewan Undangan Negeri Kelantan & Anor. v. Nordin bin Salleh & Anor.* [1992] 2 CLJ 1125; ([1992] 1 CLJ (Rep) 72), the Supreme Court held that in testing the validity of the State action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective an illusory. But before the court could look into the effect of the State law *vis-a-vis* fundamental rights, the court must first identify the alleged inconsistency between the State law and the Federal constitution (per Abdul Hamid Omar LP at p. 1135 (p. 84). On the same page Abdul Hamid Omar LP states:

> We recognise that as regards that part of the plaintiffs' case which alleged inconsistency between art XXXIA of the Kelantan State Constitution and art 10(1)(c) of the Federal Constitution, the alleged inconsistency must, first of all, be identified.

According to *Lane on the Australian Federal Systems* (2nd Ed) p 882:

> Etymologically, inconsistency arises between two things 'when they cannot stand together at the same time'. *Clyde Engineering Co. Ltd. v. Cowburn* [1926] 37 CLR 466 at p 503. 'Inconsistency' derives from 'in' (privative) and 'con' (together) and 'sistere' (stand). Judicially, however, the meaning of inconsistency has not been restricted to this narrow connotation. 'Inconsistent' for the High Court comprises four different relations (including the one just given): (1) Impossible to obey both laws and direct collision. (2) Commonwealth permits or confers: State prohibits or deprives. (3) Commonwealth confers or imposes: State modifies. (4) Commonwealth covers the field: State enters the field.

It appears to us that of the four different relations mentioned above, the one relevant to the issue which arises for decision in the present case is the situation under para (2).

At p 886, in commenting on para (2), the learned author says this: 'A Commonwealth law may simply permit X subject to certain prerequisites, and, by contract, a state law may prohibit X absolutely or permit X conditionally upon its prerequisites being fulfilled.' And further down, on the same page, he says this by way of explanation:

> One statute is inconsistent with another when it takes away a right conferred by that other … or, (i)f one enactment makes or acts upon as lawful that which the other makes unlawful … the two are to that extent inconsistent. (*Clyde Engineering Co. Ltd. v. Cowburn* (2926) 37 CLR 466 at pp 478, 490).

Applying the above principle to our instant case, I am of the opinion that there is no inconsistency between art. 11(1) and s. 2 of the 1993 Act. Article 11(1) is on the freedom of religion whereas s. 2 of the 1993 Act is on the definition of a Muslim. There is nothing in s. 2 that can be said to expressly forbids, restricts or curtail religious freedom under art. 11(1). In *Public Prosecutor v. Pung Chen Choon* [1994] 1 MLJ 566, the Supreme Court's approach on statutory interpretation on whether a particular Act is *ultra vires* the Constitution is by ascertaining "… whether the impugned legislation is directly designed to restrict the Rights guaranteed therein …" (per Edgar Joseph Jr. at p. 574/H-1). His Lordship added:

> It is therefore not necessary that legislation which incidentally restricts those Rights must be justified as falling within the permissible restrictions contemplated by cll. (2)-(4) in art 10. So, for example, any law providing for imprisonment by way of punishment for the commission of a particular act or any law providing for preventive detention, of necessity results in the eclipse or a restriction of all or most of the Rights enunciated in article 10(1), but that does not entitle a person against whom such a law is enforced to contend that his Rights under Article 10(1) have been restricted for some

purpose outside the permissible restrictions contemplated by cll. 2-4 in Article 10, if the restriction is incidental. He may only so contend if the penal law or the preventive detention law concerned is aimed at directly restricting any one or more of his Rights guaranteed under article 10(1).

I am of the view that s. 2 of the 1993 Act is enacted pursuant to art. 74(2) of the Constitution. The enabling art. 74(2) confers wide jurisdiction to the Federal Government to enact syariah laws to the same extent as provided in item 1 in the State list (see para. 6(e) list 1, Ninth Schedule). Section 2 of the 1993 Act is directly designed for the purpose of implementing syariah laws on the Muslim and it is not in any way designed to curtail the freedom of religion under art. 11(1). Mohamed Azmi SCJ has stated in *Mamat bin Daud & Ors. v. Government of Malaysia (supra)* that "… the subject of Islamic religion is both general and specific, conferred by item (1) is all embracing …" (see p. 123/E-F). Further at p. 125/1, Salleh Abas LP added, "… surely, the subject matter of whether a person or group of persons has ceased to profess his or their religion is a purely religious matter, and to create an offence for making such an imputation concerning such subject matter is well within the legislative competence of the State legislature …"

In *Mamat bin Daud & Ors. v. Government of Malaysia (supra)* the Supreme Court adopted the test "in pith and substance" to ascertain whether s. 298A of the Penal Code is *ultra vires* art. 74 and 77 of the Constitution. In order to ascertain the pith and substance of a particular legislation, the court must look into the object, purpose and design of the impugned section. In this case, the court held that s. 298A is a colourable legislation in that it pretends to be a legislation on 'public order when in pith and substance it is a law on the subject of religion with respect to which only the State have power to legislate under art. 74 and 77 of the Constitution. Therefore by adopting the "pith and substance test", s. 2 of the 1993 Act cannot be said to be *ultra vires* art. 11(1) of the Constitution. The purpose of s. 2 of the 1993 Act is merely to define a Muslim since the Constitution did not provide any definition. This is important because syariah laws are applicable only to Muslim. Without a definition provision, there would be confusion in relation to the application of the syariah laws. Without a definition section (s. 2 of the 1993 Act), only then could the 1993 Act be said to be *ultra vires* art. 11(1) since it imposes syariah law on everyone regardless of religion. Therefore s. 2 of the 1993 Act complements art. 11(1) by limiting the application of the syariah law to Muslims only.

From the definition in s. 2 of the 1993 Act, the plaintiff, is still a Muslim until there is a declaration to the contrary by the Syariah Court. In *Dalip Kaur* it was held that a bare declaration that a person has renounced Islam is not enough. Mohd. Yusof SCJ held that "… According to the Fatwa, a Muslim who renounced the Islamic faith continued to remain a Muslim until a Syariah Court makes a declaration that he has become murtad …". In *Soon Singh* case, the Federal Court held that for a conversion out of Islam to be valid, certain requirements must be complied with under hukum syarak, which only the Syariah Courts are the experts and appropriate to adjudicate. In the case of *Majlis Agama Islam Negeri Sembilan v. Hun Mun Meng* [1993] 1 CLJ 179, I held that Nurul's decision to leave the religion of Islam cannot be regarded as final until she herself declares her intention to the Majlis Agama Islam and her decision is registered. As such Nurul remained a Muslim. I therefore held that unless and until the Syariah Court makes a declaration that the plaintiff has become murtad, she remains a Muslim. As a Muslim she is therefore subject to the relevant syariah laws including the 1993 Act and the 1997 Act.

In Prayer 6, the plaintiff applied to declare that any provision of the 1993 Act (if any) which grants jurisdiction to the Syariah Courts to determine whether the plaintiff has renounced Islam or requires the plaintiff to apply to the Syariah Courts for such declaration, is null and void being inconsistent with art. 11(1). In Prayer 7, the application is to declare that any law which purportedly forbids, curtails or imposes conditions on the plaintiff's absolute rights to profess Christianity is unconstitutional of art. 11(1). Consequential from prayer 1 to 7, prayer 8 sought to declare that pursuant to art. 11(1), the 1st and 2nd defendants have no right to impose any conditions or pre conditions before the plaintiff can be considered to be a murtad (apostate). It must be noted that Prayer 6 to 8 are specific prayers which are mere repetitions of prayer 1 to 3. There is also no identification of specific provisions which are said to have infringed the rights of the plaintiff. Without identifying the impugned provisions the court is merely asked to make a declaration on hypothetical matters. In *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686, the court held that since the Summons "… does not relate to specific facts or events or if it does, these facts or events are hypothetical …" is therefore frivolous or vexatious and an abuse of the powers of the courts. Hence in the instant application I conclude that prayer 6 to 8 are struck out as they relate to hypothetical matters and are therefore frivolous, vexatious and an abuse of the process of the court.

"The new cl. (1A) of art. 121 of the Constitution effective from 10 June 1988 has taken way the jurisdiction of the Civil Courts in respect of matters within the jurisdiction of the Syariah Courts …" (per Hashim Yeop Sani CJ (Malaya) in *Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor*. [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77). I am of the view that in the instant application, the root of the plaintiff's complaint and the practical effect of the declaratory orders is to enable her to convert out of Islam, an issue within the exclusive jurisdiction of the Syariah Courts. In the case of *Imperial Tabacoo Ltd. & Anor. v. Attorney General* [1980] 1 All ER 866, the House of Lords held that where criminal proceedings were properly instituted against a person, it was not a proper exercise of judicial discretion for a judge in a civil court to grant that person a declaration that the facts alleged by the prosecution did not in law prove the offence charged, because to make such a declaration would usurp the function of the criminal court. In the case of *Tengku Jaffar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156, the trial judge held that:

> (3) Issues which relate to alleged criminality do not come within the preview of a civil court as otherwise the civil courts might be accused of intruding into the domain of the criminal courts.

In Singapore, the Civil High Court has refused to grant declaratory orders in respect of matters involving criminal jurisdiction. The learned judicial commissioner held in *JB Jeyaretnam v. Attorney General* [1990] 2 CLJ 477; [1990] 3 CLJ (Rep) 643, that the Civil Courts will not usurp a jurisdiction it does not possesses. Therefore the Civil Courts should be reluctant to grant declarations on matters which are within the jurisdiction of the criminal courts. In the instant case, where the Federal Constitution has clearly demarcated the jurisdiction of the Syariah Courts and the Civil Courts through the inclusion of art. 121(1A), the Civil Courts should not intrude into the domain of the Syariah Courts. By granting the present application, this court would not only create confusion but would also be declaring something which is contrary to art. 121(1A).

Prayer 4, 5 6 and 7 of the plaintiff's application sought to nullify certain State laws pertaining to the definition of a Muslim, syariah criminal laws and syariah laws which restricts apostasy. The said State laws are enacted pursuant to art. 74(2) of the constitution following para 1, State List of the Ninth Schedule. However it is to be noted here that the respective State Governments have not been made parties to this action. In the case of *London Passengers Transport Board v. Moscrop* [1942] AC 332, the House of Lords held that:

> The declaration should not be granted to the respondent in an action which the persons really interested, the name trade union, had not been joined as parties.
>
> At p. 345 of the Report, Viscount Maugham held that, "It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their right is made."

The said House of Lords' decision was adopted by our court in the case of *Majumder v. Attorney General of Sarawak* [1967] MLJ 101, where the Court of Appeal held prayers for declarations should not be granted on matters concerning persons interested but not joined as parties. In the instant case, since the Constitution has provided that syariah matters are within the exclusive jurisdiction of the State, only they (ie, the State authorities) would be in the position to defend their interest. Section 22 of the Government Proceeding Act 1956 also enables the State Government to be made parties on matters affecting them. Therefore applying the above principles I conclude that all the relevant prayers affecting the State Government be struck out, since the relevant State Governments have not been made parties in this action. Moreover, s. 42 of Chapter VI Specific Relief Act 1950 clearly provides that "A declaration made under this chapter is binding only on the parties to the suit, person claiming through them respectively ….". Since the State Government, having exclusive jurisdiction over syariah matters have not been made parties to defend their interest, the said prayers are hereby struck out as the same will not be binding on them. In respect of the prayers against the State Governments it is noted that there were also no identification of the impugned State provision alleged to have infringed the rights of the plaintiff under art. 11(i). In *Odhams Press Limited v. London and Pronvincial Sporting News Agency (1929) Ltd.* [1936] Ch 357, the Court of Appeal held that "… in as much as no specific document was named in which copyright was claimed and no evidence of any specific infringement had been given, the case was not one in which the court would exercise its discretionary power under O. XXV r. 5 by making the declaratory under asked for." Failure to identify the impugned State provisions also meant that the court are asked to make declarations on hypothetical matters. (See *Karpal Singh v. Sultan of Selangor (supra)*). Thus where no specific infringement has been adduced in this case, the prayers against the State Government are struck out as being frivolous, vexatious and an abuse of the process of the court.

This case raises an issue of constitutional importance. It concerns the religious position of a person born a Malay as defined in art. 160 of the Federal Constitution. On 2 February 1994 in the case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor*. [1994] 2 CLJ 107, Wan Adnan Ismail J (as he then was) dismissed the application brought by the plaintiff who converted to Islam and changed his name on 14 March 1988 but reconverted to Sikhism on 16 July 1992 and executed a deed poll to renounce the religion of Islam on 27 July 1992 to revert to his original Sikh faith and to use his original Sikh name. In that case Wan Adnan Ismail (as he then was) held:

> It is clear from the fatwa that a Muslim who renounced the Islamic faith by a deed poll or who went through a baptism ceremony to reconvert to Sikhism continues to remain in Islam until a declaration has been made in a Syariah Court that he is a 'murtad'. Therefore, in accordance with the fatwa, the plaintiff is still a Muslim. He should go to a Syariah Court for the declaration. Whether or not his conversion is invalid is also a matter for the Syariah Court to determine in accordance with hukum syarak and the civil courts have no jurisdiction.

It is noted that as from 10 June 1988 by virtue of cl. 1A of art. 121 of the Federal Constitution the Civil Courts have no jurisdiction in respect of matters within the jurisdiction of the Syariah Courts. It must also be noted that the Civil Courts are for general application; their jurisdiction is general, it is applicable to both Muslims and non-Muslims throughout the country, whereas the Syariah/courts are established by the various State Enactments and are of limited application in the sense that the jurisdiction covers Muslims only if they commit any syariah offences in those States. And they have jurisdiction only on matters which the various State Legislatures have enacted as conferring jurisdiction on them. In other words those matters although listed in List II as State List but no laws have been enacted yet, the Syariah Courts have no jurisdiction over them because the Syariah Courts have no inherent jurisdiction whereas the civil courts have inherent jurisdiction. Consequently once a decision is made that the civil court has jurisdiction to hear a syariah matter the court can decide the matter or issue which arises. As to whether the civil judge is competent to hear and decide the said matter has nothing to do with the jurisdiction of the court. This I think can be approached in two stages. If the civil judge is simultaneously also appointed by the Ruler of a State to be an Appeal Judge in the Syariah Appeal Court in that State or has obtained a syariah qualification recognsied by the State Syariah Court I am of the view that he is competent to hear and decide the said matter. Otherwise he can refer the matter to a Muslim jurist in order to assist him to make a decision. This is provided by s. 45 of the Evidence Act 1950 on opinion of experts. In the

instant case although I am qualified to hear the matter at hand if my abovementioned view is accepted and is correct I am not going to decide this case based on my syariah qualification because I am more comfortable to leave it to the Syariah Court to make a decision on the matter of faith or belief of a Muslim person. Instead I am going to decide this case as a civil matter in accordance with the Federal Constitution.

The Federal Constitution has clarified the religious position of a Malay. Article 160 of the Federal Constitution is the interpretation article. The definition of a "Malay" in cl. (2) is inclusionary in nature. It is an anthropological classification rather than based on race. This means that if a Javanese was before Merdeka Day born in Malaysia or Singapore or born of parents one of whom was born in Malaysia or in Singapore and the said Javanese professes the religion of Islam, habitually speaks the Malay language and conforms to Malay custom, he/she is a Malay by definition under art. 160(2) of the Federal Constitution. This is in conformity with art. 3 of the Federal Constitution which by cl. (1) states that Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation. This means Islam is the main and dominant religion in Malaysia. Islam has a special position in Malaysia. Therefore on freedom of religion by art. 11(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putra Jaya, federal law may control or restrict the propagation of any religious belief among persons professing the religion of Islam. It defines a "Malay" as a person who professes the religion of Islam, (substituted for Muslim religion by Act A354 s. 45 in force from 27 August 1976) habitually speaks the Malay language, conforms to Malay custom and (a) was before Merdeka Day born in the Federation or in Singapore (inserted by Act 26/1963, s. 70 in force from 16 September 1963) or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person. Therefore a person as long as he/she is a Malay and by definition under art. 160 cl. (2) is a Malay, the said person cannot renounce his/her religion at all. A Malay under art. 160(2) remains in the Islamic faith until his or her dying days. The said Malay cannot renounce his or her religion through a deed poll and sought a declaration by virtue of art. 11 of the Federal Constitution on freedom of religion and art. 11 in this instant I rule is not freedom of choice of religion. Even if one is a non-Malay and embraces Islam and becomes a Muslim convert (mualaf) and later decides to leave the Islamic faith he or she is still required to report and see the relevant State Islamic authority who will decide on her renunciation of Islam (see *Majlis Agama Islam Negeri Sembilan lwn. Hun Mun Meng* [1993] 1 CLJ 179).

In her affidavit affirmed on 8 May 2000 the plaintiff stated that her father is a Malay. His name is Jailani bin Shariff. All his life the father has been professing and practising the Islamic religion. So is the mother. Her name is Kalthum bt. Omar, a Malay. Both of the parents are still professing and practising the Islamic religion. And being Malays they habitually speaks the Malay language and conform to Malay custom. The plaintiff also stated that she is raised, and grew up in a household of Islamic belief although her belief in Islam is shallow. In exh. C she stated that her original name is Azlina binti Jailani as is stated in her I/C No. 7220456. I therefore conclude that the plaintiff is a Malay. By art. 160 of the Federal Constitution the plaintiff is a Malay and therefore as long as she is a Malay by that definition she cannot renounce her Islamic religion at all. As a Malay the plaintiff remains in the Islamic faith until her dying days. For the purposes of clarification I must state here that I have not made any decision or touched on the plaintiff's decision to leave the Islamic faith at all as I have stated earlier that I leave this to the Syariah Court to deal with the matter. My decision is based purely on the interpretation on art. 160 of a Malay under the Federal Constitution.

Article 11(1) of the Constitution grants every person the freedom to profess and practice his religion. However in respect of an act of conversion out of Islam, the same must be subject to the relevant syariah laws to be determined by the Syariah Courts. Freedom of religion under art. 11(1) must be read with art. 3(1) which places Islam in a special position as the main and dominant religion of the Federation, with the Federation duty bound to protect, defend and promote Islam. The special position of Islam in art. 3(1) is further reinforced by art. 74(2) which enables the Federal and State Government to enact syariah laws to be implemented by a separate judicial system, namely the syariah courts under art. 121(1A). Grants for Islamic development is also from the Federation (art. 12(2)). Therefore the Constitution allows syariah laws on matters relating to conversion out of Islam to be determined by the Syariah Court. To conclude, art. 11(1) gives a person the freedom to profess a religion of his choice, but on the issue of conversion out of Islam of a Muslim, only the Syariah Court is competent to determine the matter.

For these reasons the originating summons dated 15 May 2000 in encl. (1) by the plaintiff is hereby dismissed with costs. The summons in chambers dated 21 July 2000 in encl. (4) and dated 28 September 2000 in encl. (10) by the second defendant and by the first defendant respectively are therefore academic and are struck out.